No. 98-678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

Los Angeles Police Department,

Petitioner,

v.

United Reporting Publishing Corp.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

James K. Hahn
Fredrick N. Merkin
Office of the City Attorney
1800 City Hall East
200 N. Main St.
Los Angeles, CA 90012

Thomas C. Goldstein
(Counsel of Record)
Samuel C. Kaplan
Boies & Schiller, LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, D.C. 20015
(202) 237-5677

August 23, 1999

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Other Authorities

REPLY OF THE PETITIONER

None of the arguments advanced by Respondent and its supporting *amici* (collectively "Respondent") justify the Ninth Circuit's decision invalidating Cal. Gov't Code 6254(f)(3) under the First Amendment. Three arguments merit discussion here. First, Respondent is triply wrong when it claims that Section 6254 irrationally restricts the use of arrest records in commercial speech while permitting the use of the same information for many other purposes. In reality, the statute (i) restricts access to (not use of) government records, (ii) does so only for two pieces of information – the victim's and arrestee's addresses, and (iii) is not directed at commercial speech at all. Second, the historical evidence collected by Respondent does not come close to establishing that there is a First Amendment right of general public access to the information in question here: the addresses of arrestees and crime victims. Third, Respondent's allegations that certain provisions of Section 6254 are unconstitutionally vague or improperly discriminate against Respondent's publication, "The Register," are not properly presented by this facial challenge to the statute.[1]

Before expanding on those points, Petitioner emphasizes again that this Court's precedents properly leave it to legislatures to determine whether and how to release government records that contain private information. This Court has long been aware "of the threat to privacy implicit in the accumula-

---

[1] For obvious reasons, Petitioner will not address Respondent's argument that Section 6254 violates the *California* Constitution. Resp. Br. 48. Petitioner also will not address several theories that Respondent advances in passing, none of which were discussed by the lower courts. These include the arguments that Section 6254 violates Respondent's rights to due process and equal protection, and also is unconstitutionally overbroad and underinclusive. *Id.* 45-48.

tion of vast amounts of personal information in computerized data banks or other massive government files," including through "the enforcement of the criminal laws." *Whalen* v. *Roe*, 429 US 589, 605 (1972). This case presents the question whether, in the face of ever-changing technology and concerns for privacy, this Court should constitutionalize a right of access to this information for all those who wish to profit from its dissemination. It simply cannot be that California's efforts to ensure that the public is informed about crime require the state to support a private business in its efforts to sell private information about the citizenry. Such a holding would contravene this Court's repeated admonition that the release of government records is a matter of legislative grace and that the government's decision not to subsidize speech does not implicate the First Amendment. The judgment below accordingly should be reversed.

I. Section 6254 Is A Valid Restriction On Access To Government Records That Balances Individual Privacy And Benefits To The Public.

Respondent proceeds from the false premise that Section 6254 restricts commercial speech. Although Respondent never acknowledges this basic point, there is no question that the statute does not actually regulate speech. Instead, Section 6254 is a restriction on *access* to government records. Respondent therefore is reduced to arguing that Section 6254 is invalid because it purportedly permits access to arrestee addresses for essentially any purpose other than commercial speech.

Respondent's view – which the lower courts accepted – misreads Section 6254. In reality, the statute unambiguously requires that almost all information about crimes, crime victims, and arrestees be released to all persons and entities, including Respondent. But Section 6254 withholds two pieces of personal information – the arrestee's and victim's addresses – except in limited instances in which release would

produce an overriding public benefit. The statute thus limits access to only a small subset of crime-related information and simply does not create the commercial / noncommercial and speech / non-speech distinctions that Respondent envisions. Instead, Section 6254 reasonably balances the public's right to know with the right to individual privacy.

a. Section 6254 requires the release of essentially all information regarding crimes, crime victims, and arrestees to any person and for any purpose. Respecting the crime and the victim, this information includes:

> the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including * * * the time, date, and location of the occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved.

Cal. Gov't Code 6254(f)(2). Respecting the arrestee, the state must release:

> [t]he full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being help upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

Id. § 6254(f)(1).

With respect to the addresses of arrestees and crime victims, that information must be released for any "scholarly, journalistic, political, or governmental purpose, or * * * for

investigation purposes by a licensed private investigator." No person may request address information for one of these permitted purposes absent a certification that the requester will not use the information "to sell a product or service." Cal. Gov't Code 6254(f)(3).[2]

b. Respondent plainly is wrong to allege that Section 6254 is a speech restriction. Although the Ninth Circuit characterized the speech interest at stake in this case as Respondent's ability to advertise, Pet. App. 29a, Respondent contends here that its sale of addresses to third parties is itself speech. Even accepting that as true, Section 6254 is not a speech restriction because the statute simply restricts the ability to acquire, not to sell or to transmit, addresses. The statute limits only the

[2] Respondent thus is not correct when it argues that "section 6254(f)(3) does not prohibit *any* specific use of arrestee address information lawfully obtained – regardless how invasive or embarrassing – *except to sell a product or service*." Resp. Br. 23 (emphasis in original). The statute restricts only access to (not use of) address information and permits access only for the few purposes set out in the statute.

Of all Respondents' other mischaracterizations of Section 6254, only two require a direct reply. First, Respondent wrongly contends that Petitioner's defense of Section 6254 "is tantamount to arguing that a gravely ill person should be spared information about possible treatment." Resp. Br. 24. The appropriate analogy is that if the state requires gravely ill people to identify themselves to the government, Petitioner believes those persons have an interest in maintaining their privacy and in deciding for themselves whether and how to seek treatment. Second, *amicus* Reporter's Committee for Freedom of the Press *et al.*, at 26 n.26, states without any explanation that "Petitioner apparently assumes, contrary to the presumption of innocence afforded by our Constitution, that a presumption of guilt attaches upon arrest." Precisely the opposite is true. Persons who are arrested (as opposed to convicted) or who are the victims of crime have an interest in maintaining that as a private fact.

state's assistance and does so only in the sense that the government's failure to provide a private party with any resource indirectly limits the sale of that resource.[3]

Respondent therefore must contend that every restriction on the release of any government record (whether for national security, privacy, or any other reason) is a speech restriction subject to the First Amendment. But there can be no real question that the state could withhold access to address records entirely. As this Court repeatedly has held, access to government aid in obtaining private information is a matter of "legislative grace," *Seattle Times Co.* v. *Rhinehart*, 467 US 20, 34 (1984), the Constitution is "neither a Freedom of Information Act nor an Official Secrets Act," *Houchins* v. *KQED*, 438 US 1, 14 (1978) (plurality opinion), and a right of access to government proceedings only attaches when there has been an "unbroken, uncontradicted" tradition of access,

[3] In this context, Respondent's argument must be that the state, by not releasing addresses, is itself refusing to speak to Respondent, which in turn interferes with Respondent's ability to speak to others by selling the information received from the government. As such, this case is governed by this Court's decisions holding that the government need not subsidize speech. *See generally* Pet. Open. Br. 26-30 (discussing cases holding that government may refuse to fund one type of speech so long as it does not penalize speech). "The reasoning * * * is simple: 'although government may not place obstacles in the path of a person's exercise of speech, it need not remove those not of its own making.'" *Regan* v. *Taxation With Representation*, 461 US 540, 549-50 (1983) (quoting *Harris* v. *McRae*, 448 US 297, 316 (1980) (alterations omitted)). It therefore is no answer that the state could recoup the costs of providing address records through a fee. Resp. Br. 3 n.4. Instead, the relevant point is that the First Amendment does not require the government to facilitate speech. Here, even if California were to charge Respondent, the state nonetheless would be "subsidizing" Respondent's activities by providing Respondent with a cost-efficient means of acquiring address information.

Richmond Newspapers v. *Virginia*, 448 US 555, 572 (1980). *See generally* Pet. Open. Br. 16-25.[4]

Respondent's only answer is that Section 6254 is unique because, at bottom, the statute is intended to operate as a speech restriction by preventing the commercial solicitation of arrestees. *Contra Turner Broadcasting System* v. *FCC*, 512 US 622, 652 (1994) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). That is true only insofar as *every* restriction on the release of government records purposefully prevents the further dissemination of that information. In other words, the government restricts the release of personal medical records, 5 USC 552(b)(6), not just to avoid misuse by the initial recipient but also because that recipient may forward the records to 500 other people as an act of "free speech."

In this case, Respondent specifically misconstrues California's effort to protect individual privacy. It is common ground that the address information withheld under Section 6254 is useful for two purposes: (i) as a means of positive identification (distinguishing between multiple individuals with common names); and (ii) as a point of contact. The California legislature has determined that positive identification and contact of arrestees and crime victims constitute an unwarranted invasion of privacy. Importantly, Section 6254 limits such privacy invasions whether or not they arise from speech: Respondent cannot acquire addresses to sell them to employers who want to determine if job applicants have been

---

[4] Respondent erroneously claims that Petitioner is relying on the syllogism that "greater power includes the lesser." This is not a case in which the government claims that the ability to prohibit primary conduct (*e.g.*, gambling) confers the power to restrict speech regarding that conduct (*e.g.*, gambling advertisements).

arrested, nor are addresses available to curiosity seekers or vigilantes.[5]

c. This suit arises only because California has taken the further step of releasing address information – and thereby facilitating positive identification and providing a point of contact – in a limited set of instances, each of which fulfills an overriding public purpose. Critically, these purposes are unrelated to the recipients' viewpoint, the content of their speech, or indeed speech at all. Address information is collected principally for the "governmental" uses permitted by Section 6254. In addition, scholarship and journalism inform the public regarding police practices, arrest patterns, and the effect of crime on victims. "Political" uses of address information relate directly to the process of governing, not private gain. Finally, legitimate investigations by private investigators are government-licensed adjuncts to the state's own law enforcement efforts.

These categories defy Respondent's claim that Section 6254 distinguishes between commercial and noncommercial uses of address information.[6] The obvious example is that the

---

[5] Although Respondent focuses on its clients' desire to contact arrestees, which the state deems an invasion of privacy, positive identification has substantial effects on individual privacy as well. Once in possession of the address, one can link arrestees and crime victims with the other demographic information contained in arrest reports, as well as data collected from third parties. It is this possibility that gives rise to the state's interest in not making government records available to facilitate the creation of informational databases about individuals. This concern is even more grave with respect to other classes of records collected in the Appendix to the Petition for Certiorari that states consistently withhold from commercial users, such as welfare rolls and election contribution lists.

[6] Even Respondent seems to acknowledge this point in arguing that Section 6254 restricts access for "noncommercial" purposes, including "legal, medical, religious, literary, scientific, philosophical and artistic" uses of address information. Resp. Br. 14.

statute equally restricts access for all of Respondent's customers, whether commercial (*e.g.*, law firms) or noncommercial (*e.g.*, religious counselors). Although the statute does not permit access to address information for most commercial uses, including an employer's unlawful attempt to determine whether an applicant or employee has been arrested,[7] those purposes involve private gain. By contrast, when commercial uses result in an overriding public benefit – such as private investigations and journalism (which Respondent notes is a profit-making enterprise) – the state grants access. Similarly, the statute forbids access for *non*commercial uses for private gain (such as curiosity seeking) but permits access for public benefit (such as scholarship and politics).

Respondent is equally wrong to claim that Section 6254 distinguishes between speech-related and non-speech related uses of address information. The statute permits access to address records for many other speech-related purposes that have an overriding public benefit, including journalism, published scholarship, and political advocacy. Section 6254 also withholds access for some non-speech related purposes (*e.g.*, idle curiosity and employment decisions by businesses) but grants access for others (*e.g.*, private investigation). In each respect, the lines drawn by the statute turn not on the viewpoint of the party requesting address information but instead on the Legislature's studied conclusion that some – but not all – uses of address information have a public benefit that is sufficiently weighty to overcome the interest in individual privacy.

---

[7] *Compare* Resp. Br. 36 (arrest records "assist in filling sensitive employment positions") *and Amicus* Br. of Individual Reference Services Group *et al.* 2 (explaining that *amicus*' members obtain arrest report "information from certain states for use for employment screening of, for example, school bus drivers, child care workers, and nursing home orderlies") *with* Cal. Lab. Code 432.7 (forbidding employers from asking job applicants about arrests).

Respondent's contrary view of the statute apparently stems from a clause in Section 6254 that requires that parties with a permissible basis for requesting address information also certify they will not use the addresses "to sell a product or service." Cal. Gov't Code 6254(f)(3). But this clause simply ensures that a party will not circumvent the statute's carefully defined limitations by requesting access to address information for a permitted purpose (such as journalism) only to also make wider use of the information when the resulting invasion of privacy would outweigh any public benefit. For example, assuming that Respondent has a legitimate journalistic purpose in requesting address information for its publication, "The Register," *see infra* at 17-18, the clause in question is the most reasonable means of preventing Respondent from subsequently selling the addresses for a profit. California's only alternative to this access restriction would be to ban the *use* of lawfully possessed address information in selling a product or service, which, if anything, would be more troubling as a restriction on speech. *See Florida Star* v. *BJF*, 491 US 524, 534 (1989) (encouraging states to adopt restrictions on access to government records "as a less drastic means than punishing truthful publication [to] guard[] against the dissemination of private facts").

d. Respondent also is wrong to rely on this Court's decisions holding that a commercial speech restriction is invalid when it "distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Greater New Orleans Broadcasting Assn.* v. *United States*, 119 S. Ct. 1923, 1935 (1999) (restriction on broadcast advertisement of private casino gambling, but not state-run, tribal, nonprofit, and occasional casino gambling); *see also Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). Unlike Section 6254, the statutes presented in those cases were direct speech restrictions. But just as important, those statutes were "so pierced by exemptions and inconsistencies

that the Government [could not] hope to exonerate [them]." *Greater New Orleans*, 119 S. Ct. at 1933. Section 6254, by contrast, permits access to address information only in limited circumstances that differ both in kind and in degree from Respondent's desire to sell addresses in bulk.[8]

This lawsuit is proof positive of the statute's rationality. Respondent maintains that Section 6254 irrationally mandates the release of address information for many purposes, resulting in widespread public dissemination through newspapers, television, scholarship, and by private investigators. But Respondent also maintains that Section 6254 completely blocks its access to address information. Those two positions cannot be reconciled: if the statutory exceptions emphasized by Respondent in fact led to the general public dissemination of address information, Respondent and its customers would have access to the material and hence no cause to complain.

The truth of the matter is that Respondent is simply wrong to contend that Section 6254 leads to the widespread release of address information. Respondent presented no such evidence to the district court.[9] The California First Amendment Coalition advised the Legislature that "newspapers seldom print exact addresses nowadays." Ct. App. Supp. Excerpts Rec. 382. Respondent and its six *amici* have identified only

---

[8] For the same reason, this case is very different from *City of Cincinnati* v. *Discovery Network*, in which the government sought to restrict commercial newsracks, but not noncommercial newsracks, based solely on an asserted higher value for noncommercial speech. 507 US 410, 424 (1993) (restriction was invalid because it bore "no relationship *whatsoever* to the particular interests" asserted).

[9] Instead, the lower courts ruled based on the erroneous assumption, Pet. App. 11a (district court), 25a (court of appeals), which Respondent no longer defends as correct, that Section 6254 requires the release of arrest records for any purpose other than commercial speech, including curiosity seeking.

one California newspaper that publishes *any* arrestee addresses (the *Sacramento Bee*[10]) and *no* examples involving scholars, politicians, or private investigators, which is a far cry from the constant, *en masse*, and state-wide disclosure that Respondent demands here. The most that Respondent can say is that, under Section 6254, newspapers, scholars, and politicians "could" engage in the dissemination of address information, not that they actually *do* so, which is the relevant inquiry.[11] In reality, the marketplace makes Respondent a viable commercial enterprise precisely because it distributes arrestee address information on a different order of magnitude than any other type of recipient. Even if there is any doubt about this point, it is precisely the kind of determination that appropriately is left to the studied judgment of legislators, and there is ample record evidence supporting the judgments embodied by Section 6254. *See* Pet. Open. Br. 2-5.

This case accordingly cannot fairly be distinguished from *United States Department of Justice* v. *Reporter's Committee for Freedom of the Press*, which approved the FBI's policy of withholding criminal "rap sheets" even insofar as they contain information that "is a matter of public record." 489 US 749, 757 (1989). This Court found that a privacy interest justified withholding rap sheets, notwithstanding that they (i) were "used in the preparation of press releases and publicity designed to assist in the apprehension of wanted fugitives," and (ii) were released to (a) various banks, (b) state and local governments, (c) self-regulatory organizations in the securities

---

[10] Contrary to Respondent's claim, Resp. Br. 30 n.21, the *Fresno Bee* prints only the names (not addresses) of men and women arrested for prostitution offenses. Ct. App. Supp. Excerpts Rec. 479.

[11] Nor can Respondent even hypothesize circumstances in which the statute results in the public dissemination of crime victims' addresses, but the logic of the ruling below would mandate that this information be provided to Respondent as well.

industry, and (d) licensees and applicants before the Nuclear Regulatory Commission. *Id.* at 752. Respondent attempts to distinguish *Reporter's Committee* only by quoting the Court's explanation that "plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764. But the reasoning of *Reporter's Committee* is fully applicable here: there is an equally "vast difference" between the limited number of arrestee addresses that Respondent can gather through a "diligent search" of news reports and occasional scholarly publications and the *en masse* disclosures that Respondent receives absent a provision such as Section 6254. *See also id.* ("Indeed, if the summaries were 'freely available,' there would be no reason to invoke the FOIA to obtain access to the information they contain.").

Respondent's argument also relies on a mischaracterization of the state interests furthered by Section 6254. Respondent contends that the statutory exceptions that permit the release of addresses to journalists and scholars irrationally permit invasions of privacy. But Respondent ignores entirely the explanation in Petitioner's opening brief that Section 6254 is designed not to further individual privacy at the sacrifice of all other interests, but instead to balance individual privacy against the public benefits available from the targeted release of address information, including informing the public about crime.[12] California releases addresses to journalists, scholars,

[12] California's effort to balance these interests is clear from the history of Section 6254(f)(3), which Petitioner detailed in its opening brief, at 2-5, but which Respondent ignores. The State initially considered completely prohibiting the release of address information, but ultimately adopted certain exceptions (including for journalists and private investigators) as a more "tailored" remedy for the evils the state sought to prevent. Substantial record evidence was presented to the California legislature demonstrating that demands for the release of address information had increased by 1200%, Ct. App. Supp. Excerpts Rec. 307, and that as a result arrestees frequently received from 12 to 16 solicitations each, *id.* 334, 361. Pet. Open. Br. 2-5. *Contra* Resp. Br. 5, 20 (claiming that "[n]o evidence in the record supports the existence of any 'solicitation invasion' problem" and that "Petitioner produced no evidence that any privacy invasion had existed before the statute's enactment").

and political advocates, whose protection is the First Amendment's core concern.[13] Respondent further ignores the fact that although the statute permits news outlets to publish lists of the names and addresses of some arrestees, every indication is that only a few do so, and even then only for more important, newsworthy crimes. Moreover, even if that were not correct, the state would retain legitimate interests in not participating in the for-profit dissemination of the addresses of arrestees and crime victims, and in not being perceived as facilitating such a business, particularly when it is the government that compels arrestees and crime victims to provide the personal information in question.

II. The Historical Evidence Does Not Establish A First Amendment Right Of Public Access To Arrestee And Crime Victim Addresses.

Respondent contends that there is a First Amendment right of access to the information withheld under Section 6254, an argument that was squarely rejected below.[14] But, as in the

[13] A prohibition on such exceptions would, ironically, give legislatures a substantial incentive to prohibit the release of address information altogether, which would only undermine the speech interests of journalists and scholars.

[14] In point of fact, Respondent principally argues that there is a common law right of access, Resp. Br. 36-37, leaving it to an *amicus* to address the asserted First Amendment right of access. Regarding Respondent's argument, any common law right of access has been supplanted by Section 6254.

lower courts, Respondent has failed to establish here that "the place and process have historically been open to the press and the general public." *Press-Enterprise Co.* v. *Superior Court*, 478 US 1, 8 (1986). In the first instance, this entire line of authority is limited to events – such as trials, preliminary hearings, and jury voir dires – rather than government records, which are neither a "place" nor a "process." In any event, it is telling that the historical tradition and right of access asserted by Respondent never have been recognized by any judge in any state or federal court or (to Petitioner's knowledge) identified in any of the scholarly literature regarding this nation's history.

Respondent first explains that in colonial times there was not uniformly an organized police force, such that law enforcement duties sometimes were handled by the citizenry. Br. of Investigative Reporters & Editors, Inc. as *Amicus Curiae* 8-12. If anything, this would prove only that the citizenry had access to address information insofar as it participated in "serving as constables during the day or watchmen during the night." Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 825 (1994). There is no evidence of a broader public right to, or interest in, address information. To the extent this early private law enforcement has a modern analogue, it is carried on by private investigators, who are provided address information under Section 6254.

Respondent also contends that in later periods arrestee addresses were published by the press. But this argument fails to prove Respondent's point, as Section 6254 itself grants the press access to address information and the question instead is whether there traditionally was a broader right of public access, including a right to use address information for profit. Respondent has produced no evidence that this was the case. Moreover, even the newspaper quotations invoked by Respondent are anecdotal and are a far cry from the tradition "throughout the United States" required by this Court's

precedents. *El Vocero De Puerto Rico* v. *Puerto Rico*, 508 US 147, 150 (1993) (per curiam). Respondent's examples also frequently are inapposite, as a majority do not contain addresses or do not involve arrests.[15] Nor is there any evidence at all regarding what sources provided the press with the information, including particularly whether the government regarded the press as possessing a right to review police blotters.

As a separate matter, Respondent has not established that "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co.*, *supra*, 478 US at 8. Section 6254 not only requires the uniform release of almost all information about crimes, crime victims, and arrestees, but also requires that newspapers and scholars have access to the victim's and arrestee's addresses. Respondent does not assert that the broader release of address information is necessary to serve any public interest, including to inform the public adequately about crime. Section 6254 thus provides for an informed public by mandating the uniform disclosure of almost all crime information (such as the date and type of each reported crime, the location of the crime, the name and description of the arrestee, and the name of the victim), but does not uniformly require that the state facilitate efforts by the general public and businesses such as Respondent to identify and to contact arrestees and crime victims. The Legislature determined that such widespread release of address information would constitute an unwarranted invasion of privacy.

---

[15] *E.g.*, Br. of Investigative Reporters & Editors, Inc. as *Amicus Curiae* 12-17 (examples of Esther M'Connell, William Kerr, and Zechariah Allen not involving addresses; examples of John Gosling, Simeon Belknap, John Jones, Thomas Walsh, and Selah Sheldon not involving arrest reports).

In addition, Respondent clearly seeks address information to profit, not to assist in the arrest process. As this Court explained in *Reporter's Committee*:

> In this case -- and presumably in the typical case in which one private citizen is seeking information about another -- the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

489 US at 749. In these circumstances, no right of access to government records arises.

III. Respondent's Remaining Arguments Are Not Properly Presented In This Court.

Several of Respondent's remaining arguments are not properly presented to this Court because they rest on a misunderstanding of the holding below. The lower courts invalidated Section 6254 on its face and therefore never addressed the statute's application to Respondent's different uses of address information. *See* Pet. App. 22 (district court opinion declining to reach Respondent's remaining claims "[s]ince the Court finds Cal. Gov. Code § 6254(f)(3) unconstitutional as an impermissible limitation on commercial speech"); *id.* 36 (court of appeals opinion affirming "[h]aving concluded that § 6254(f)(3) violates *Central Hudson*"). The lower courts specifically had no cause to distinguish between Respondent's sales of addresses through an information service and its distribution of its publication, "The Register."

Respondent now contends that even if Section 6254 is valid as applied to Respondent's information service, the statute nonetheless is invalid as applied to "The Register."[16] That

[16] We note that Respondent did not raise this issue, which would seem to require modifying the lower courts' judgment that

issue, however, is not properly presented to this Court because Respondent may be entitled to acquire addresses for use in "The Register." Respondent's complaint sought a declaration that "The Register" fell within the statutory exceptions for journalism and scholarship,[17] but as noted, the lower courts never reached that question and specifically never made any factual findings about the nature of "The Register." Respondent acknowledges that it never has requested address information under the journalism and scholarship provisions. Resp. Br. 46 n.31.[18] Because neither the parties nor the Court know at this point whether Section 6254 permits Respondent to acquire address information for use in "The Register," this Court should not in the first instance adopt a potentially uninformed and unnecessary holding that the Constitution mandates access to records for that purpose.

Similarly, there is no basis for addressing, much less adopting, Respondent's assertion that the categories set out in Section 6254 (*i.e.*, journalism, scholarship, and politics) are unconstitutionally vague. These classifications are easily definable. *Cf.* 5 USC 552(a)(4)(ii)(II) (FOIA provision based on category of "representative of the news media"); 28 CFR 16.11(b)(6) (regulation further defining statutory category).

Section 6254 is invalid on its face, through a cross-petition for certiorari.

[17] Ct. App. Excerpts Rec. 334, ¶ 5 (requesting a declaration "that the publication of plaintiff, 'Register,' * * * falls within the provisions of the Amendment"); *see also id.* 699, ¶ 4 (declaration submitted by Respondent asserting that "[i]t is United Reporting's intent that the 'JailMail' Register be informative, journalistic as well as scholarly").

[18] Respondent states that "United Reporting could not sign the declarations required by section 6254(f)(3) for fear of criminal liability," Resp. Br. 46 n.31, which Petitioner takes to mean only that Respondent also intended to sell addresses for a profit, which prohibits Respondent from receiving address information under the statute.

Any ambiguities exist only because this litigation resulted in a prompt injunction against enforcement of Section 6254 and therefore made it impossible for California's law enforcement agencies to address any questions regarding the statute's scope.[19] Certainly, this is not an instance in which it is appropriate for courts to intervene prior to the application of a statute, as when a law impermissibly has granted officials the unfettered discretion to apply a vague speech restriction or when the statute's mere existence chills expressive activity.

CONCLUSION

For these reasons, as well as those set forth in Petitioner's opening brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

James K. Hahn
Frederick N. Merkin
Office of the City Attorney
1800 City Hall East
200 N. Main St.
Los Angeles, CA 90012

Thomas C. Goldstein
(Counsel of Record)
Samuel C. Kaplan
Boies & Schiller, LLP
5301 Wisconsin Ave, NW
Suite 570
Washington, D.C. 20015
(202) 237-5677

David Boies
Boies & Schiller LLP
80 Business Park Dr.
Suite 110
Armonk, NY 10504
(914) 273-9800

August 23, 1999

---

[19] For example, the State never has had the opportunity to address whether reference services retained by journalists fall within the statute's journalism provision, a point that was first raised in the *amicus curiae* submissions in this Court.